REPORT

to the Supreme Court
and the Legislature
on

DEFENSE FEES AND COSTS IN WASHINGTON STATE APPELLATE DEATH PENALTY CASES

by the Office of Public Defense
Advisory Committee

September 30, 1998
Olympia, Washington

REPORT

to the Supreme Court and the Legislature
by the Office of Public Defense Advisory Committee

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EXECUTIVE SUMMARY

During its 1997 session, the Washington State Legislature enacted a bill establishing the 97-99 biennium budget for the state Office of Public Defense. In that bill the Legislature requested a report from the Office of Public Defense Advisory Committee regarding the administration of costs in appellate death penalty cases. The Legislature said: "The cost of defending indigent offenders in death penalty cases has escalated significantly over the last four years. The office of public defense advisory committee shall analyze the current methods for reimbursing private attorneys and shall develop appropriate standards and criteria designed to control costs and still provide indigent defendants their constitutional right to representation at public expense. The office of public defense advisory committee shall report its findings and recommendations to the supreme court and the appropriate legislative committees by September 30, 1998."

This report is a response to the legislative directive. The report and recommendations are summarized below.

Summary of Facts

1. The Office of Public Defense (OPD) assumed the administration of costs in death penalty cases from the Supreme Court in 1996. The rate of pay for attorneys handling death penalty cases ($50 an hour) was established by the Supreme Court in the late 1980s and has not changed since.

2. The provision of appellate counsel in death penalty cases is at a standstill. Experienced death penalty attorneys who have been appointed to these cases in the last several years are now refusing to take new cases at the rate being paid. As a result, three defendants, who have pending death penalty cases in the Supreme Court, are not represented by counsel.

3. Costs for appellate death penalty cases have risen over the years. Reasons for increased costs are many and varied. Among the reasons for rising costs are:

a) The number of death penalty cases has gone up in the last five years.

b) The issues presented in these cases are more complex and require more litigation.

c) U.S. Supreme Court cases and federal legislation require vigorous and thorough litigation in death penalty cases at the state court level.

d) More experts and investigators are being used, especially in personal restraint petitions, in response to the complexity of the cases and the need for thorough litigation.

e) New Washington State Supreme Court rules require the appointment of at least two attorneys in capital appeals.

f) Invoices indicate some duplication in attorney hours claimed and, in some cases, an apparently disproportionate number of hours spent on less meritorious issues.

Alternatives Considered

4. There are a number of different alternatives for administering costs in appellate death penalty cases. Some of these alternatives are more expensive than others and some control costs better than others. The alternatives are:

a) Continue to pay the same rate of $50 per hour, which would necessitate appointment of inexperienced, or less experienced, death penalty attorneys to capital cases.

b) Pay the experienced capital attorneys a higher rate per hour. A reasonable rate should take into consideration overhead costs of the attorneys.

c) Pay a higher rate per hour to capital attorneys but cap it at a maximum amount. The cap should be based on the average number of hours it takes to handle a direct appeal or a personal restraint petition in a capital case. Once the cap is reached further payment may be offered if appropriate.

d) Pay capital attorneys a flat fee. The fee would depend on the case being appealed.

e) Contract with a non-profit agency or contractual provider to handle representation in capital cases.

f) Establish an in-house staff of attorneys who will provide

representation in all appellate death penalty cases, if the Legislature chooses to amend RCW 2.70.

Conclusion

Standards and criteria and findings and recommendations were made by the Advisory Committee after an analysis of the above issues. The Advisory Committee concluded that an individualized cap payment method is appropriate for appellate death penalty defense funding. A capped fee will be calculated for each new appellate capital defense attorney appointment to provide for reasonable attorneys fees for a predicted adequate number of hours, plus basic investigator and expert costs. A fee contract will establish that if unanticipated circumstances occur, the defense attorney can request a fee adjustment.

Such a fee arrangement will reimburse defense counsel at a reasonable hourly rate and encourage efficient defense practices, while providing for the defendant's constitutional right to representation at public expense.

REPORT TO THE SUPREME COURT AND TO THE LEGISLATURE BY THE STATE OFFICE OF PUBLIC DEFENSE ADVISORY COMMITTEE

regarding its Defense Fees and Costs in Washington State Appellate Death Penalty Cases

SEPTEMBER 30, 1998

I. Introduction

In the 1997-1999 biennium budget bill, the Washington State Legislature requested a report from the Office of Public Defense (OPD) Advisory Committee relative to the Committee's findings and recommendations on the administration of costs in appellate death penalty cases. Specifically, the Legislature said,

> The cost of defending indigent offenders in death penalty cases has escalated significantly over the last four years. The office of public defense advisory committee shall analyze the current methods for reimbursing private attorneys and shall develop appropriate standards and criteria designed to control costs and still provide indigent defendants their constitutional right to representation at public expense. The office of public defense advisory committee shall report its findings and recommendations to the supreme court and the appropriate legislative committees by September 30, 1998. Ch. 149, Laws of 1997, Section 113 (SSB 6062).

The purpose of this report is to answer the directive of the Legislature. The Advisory Committee assumes the Legislature requested this report to address costs associated only with indigent appellate services in death penalty cases, consistent with the Office of Public Defense's enabling statute, RCW 2.70. Consequently, this report addresses standards and recommendations for the administration of appeals and personal restraint petitions in death penalty cases.

The issue of the death penalty is a highly controversial one. It is not the purpose of this report to advocate a position regarding capital punishment, but rather to analyze what appellate death penalty defense work costs and make

recommendations for future payment of costs which are both economically reasonable and fair to the capital defendants.

Under the federal and state constitutions, payment standards and criteria developed by the Advisory Committee must be consistent with the constitutional guarantees of representation at public defense and the effective assistance of counsel.

II. History of the Office of Public Defense

The Office of Public Defense administers all appellate indigent defense services in Washington State. Legal representation at public expense is guaranteed to indigent defendants by both the federal and state constitutions in state and federal criminal cases. This right extends to criminal cases on appeal as well as to three kinds of civil appeals: appeals from findings of dependency, termination of parental rights, and some types of involuntary commitment.

Historically the appellate indigent defense program was administered by the Washington State Supreme Court and the Office of the Administrator for the Courts. In 1996 the Office of Public Defense was created by the Legislature to assume the financial responsibilities for appellate indigent defense. OPD is not permitted to provide direct legal representation. Instead, its primary duties are to manage the funds used to pay private and non-profit attorneys, court reporters, and court clerks for appellate defense at public expense. OPD is governed by an advisory committee composed of eleven members appointed by the Legislature, governor, the Supreme Court, and the state bar association.[1] Pursuant to RCW 2.70.020, the director of the agency, under the supervision and direction of the Advisory Committee, administers all criminal appellate indigent defense services, including services in indigent death penalty cases.

Before the establishment of OPD, the superior court was responsible for appointing attorneys in death penalty appeals. The Supreme Court paid the defense attorneys who provided representation and paid all costs in death penalty cases including costs for transcribing the record and reimbursing court clerks. When OPD was created, "all powers, duties, and functions of the supreme court and the office of the administrator for the courts pertaining to appellate indigent defense" were transferred to OPD.[2] The Supreme Court, which retains the authority to appoint attorneys in death penalty cases, appoints

[1] Advisory Committee membership is listed on the inside cover of this report.
[2] RCW 2.70.050

counsel with training and experience for individual defendants. Once appointed, attorneys send invoices to OPD for payment. The Supreme Court has no involvement in the rate of pay, structure of invoices, or approval of fees.

OPD contracts with retired Thurston County Superior Court Judge Robert Doran to review all invoices submitted each month from attorneys in pending death penalty cases.[3] Judge Doran examines the invoices to determine whether the hours spent were necessary, appropriate to the claimed task and actual product, and whether the content of the invoices sufficiently supports payment. As part of his evaluation, he reads the defense briefs submitted in death penalty cases. Once the judge approves invoices, the fiscal analyst for OPD pays them. All invoices are required to be detailed enough to enable OPD to determine that the claimed expense was incurred, that it was incurred for a particular case, and that it was authorized under Washington's Rules of Appellate Procedure and under OPD's Guidelines.[4]

[3] Retired Judge Doran served on the Thurston County Superior Court bench for 20 years, where he presided over aggravated first degree murder trials, among other felonies.
[4] See Appendix A for OPD Guidelines in death penalty cases.

III. History of Death Penalty Costs in Washington

In 1972, the U.S. Supreme Court held that all death penalty state statutes were unconstitutional in *Furman v. Georgia*, including Washington's statute[5]. During the next decade, many states revised and reinstated their death penalty laws, this time providing for bifurcated or two-stage trials. In 1976, the U. S. Supreme Court approved the new capital statutes in *Gregg v. Georgia*.[6] Currently, 38 states and the federal government have active capital punishment laws.[7]

The state of Washington instituted the present death penalty law in 1981 with the adoption of RCW 10.95. To be sentenced to death, a defendant must have been convicted of aggravated first degree murder and without "sufficient mitigating circumstances to merit leniency."[8] Since 1981, twenty-four men have been sentenced to death in the Washington trial courts.[9] Each of them appealed their judgment and conviction through direct appeal and many filed personal restraint petitions (PRPs). Washington State paid $1,853,016 for defense costs in appellate and personal restraint petitions in death penalty cases from 1981 to August 31, 1998.[10]

Defendants in death penalty cases have a right under the federal constitution, the state constitution, and state statute to a direct appeal

[5] 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
[6] 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
[7] The American Bar Association provides an excellent general discussion of death penalty procedure and the problems occurring under the new statutes in the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.
[8] RCW 10.95.030(2).
[9] Gary Benn, James Leroy Brett, Cal Coburn Brown, Charles Rodman Campbell, Richard Mathew Clark, Cecil Emile Davis, Wesley Allen Dodd, Clark Richard Elmore, Charles Ben Finch, Michael Monroe Furman, Jonathan Lee Gentry, Benjamin J. Harris, Patrick James Jeffries, Brian K. Lord, Sammy Luvene, Kwan Fai Mak, Henry Lewis Marshall, Blake Richard Pirtle, David L. Rice, Michael Kelly Roberts, Mitchell Rupe, Jeremy Sagastegui, Darold Ray Stenson, and Dwayne L. Woods.
[10] A history of payments made in death penalty cases, including attorney fees, out-of-pocket costs, court reporter fees, and clerk and brief reproduction fees since 1981, is located in Appendix B.

challenging their trial court convictions and sentences of death. Those under a death sentence also have a statutory right to collaterally attack their convictions and to the assistance of counsel for purposes of prosecuting this attack.[11] This procedure is referred to in Washington as the personal restraint petition (PRP).

The Washington State Supreme Court has original and exclusive jurisdiction over personal restraint petitions in death penalty cases.[12] RCW 10.73.150 establishes that the state pays the cost of counsel for the petitioner (the person sentenced to death). Once the petition is filed the Supreme Court considers the issues presented in the petition and determines whether a reference hearing is needed.[13] During reference hearings, which are held in superior court, the parties produce evidence regarding facts which are at issue. The trial judge hears the evidence and determines the disputed facts based on evidence produced at the hearing. These factual determinations are sent to the Supreme Court, which considers the petition and makes a ruling based on the briefs, arguments, and superior court findings.[14] Defense attorney costs incurred on the reference hearing are paid by OPD because the Supreme Court retains jurisdiction over the hearing even though it is held in front of a superior court judge.

In 1981, when the present capital punishment statute was enacted, trial courts appointed experienced defense attorneys to represent defendants in

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[11] RCW 10.73.090 and 10.73.150. When it voted to enact the present RCW 10.73.150, the Legislature noted that there "is no constitutional right to appointment of counsel at public expense to collaterally attack a judgment and sentence in a criminal case or juvenile offender proceedings or to seek discretionary review of a lower appellate court decision. The legislature finds that it is appropriate to extend the right to counsel at state expense beyond constitutional requirements in certain limited circumstances to persons who are indigent and persons who are indigent and able to contribute as those terms are defined in RCW 10.101.010." Finding-1995 to RCW 10.73.150.

[12] RAP 16.3.

[13] See RAP 16.12 et. seq.

[14] Post-conviction proceedings [PRPs], perceived as a "second (or third) bite at the apple, have been under attack by courts seeking to limit them and by legislators seeking to limit or abolish them. Yet, the high percentage of defendants who receive relief when represented by counsel in postconviction proceedings indicates that substantial error is not being prevented or cured at earlier stages. . . Condemned defendants later shown to be innocent have been saved from death by postconviction relief after direct appeal had failed." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, at 143.

appeals and PRPs.[15] Once these appellate attorneys were appointed, they were paid by the Supreme Court's Appellate Indigent Defense Fund. Initially, death penalty attorneys handling appellate cases were paid $40 per hour. In the late 1980s, the amount was raised to $50 per hour.[16] A schedule of payments to attorneys in Washington's thirty-nine death penalty appellate cases is located in Appendix B.

Over the last several years the Supreme Court has developed and instituted a list of guidelines for defense attorneys out-of-pocket expenses which establish the amounts paid to them. (See Appendix A) Traditionally, attorneys have been limited to one trip to Walla Walla to talk with their clients. They are reimbursed for the costs of hiring expert witnesses if specifically ordered by the Court, long distance telephoning, and copying costs, as well as the use of legal assistants and Westlaw research. Overhead costs, including secretarial services, equipment, rent, and other costs, are considered to be part of the $50 hourly attorneys' fee.

In addition to attorney costs, OPD pays other required costs such as fees to Superior Court clerks for clerks papers, which are motions, orders and other trial documents reviewed by the Supreme Court during the appeal. OPD also reimburses court reporters for transcription of the Verbatim Report of Proceedings (VRP). These trial transcripts include all hearings held in conjunction with the Superior Court trial. Court reporter rates have increased from $2.25 per page to $2.75 per page between 1987 and 1995. During the 1990s, the costs reimbursed to court reporters in capital cases have gone up primarily due to the rate increase, longer trials, and PRP hearings. [17]

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[15] This has been the case up until December 1997 when the Supreme Court adopted a series of new rules in death penalty cases. Under Special Proceedings Rules – Criminal Rule 1, the Supreme Court assumed the responsibility for appointment of appellate defense counsel in all death penalty cases. Under the new RAP 16.25 the Supreme Court has the authority to appoint counsel for the petitioner in PRPs as well.

[16] Interview with C.J. Merritt, Clerk of the Washington State Supreme Court, on June 17, 1998.

[17] A history of payments to court reporters and Superior Court clerks is located in Appendix B. Death penalty expenditures by calendar year is found in Appendix C and status reports on pending cases is located in Appendix D.

IV. Present Appellate Death Penalty Caseload and Controversy

Appellate death penalty attorneys fees, set at $50 per hour during the late 1980s, remain at that amount. At an August 11, 1998 Office of Public Defense Advisory Committee meeting, appellate defense attorneys described how their overhead costs and other costs of doing business have increased in recent years. The relatively high hourly rates charged by private attorneys and salaries earned by prosecutors doing death penalty appellate cases were also described, as well as federal court appellate death penalty rates of $110 to $150 per hour.

In March 1998, after capital defendant Donald Stenson filed a personal restraint petition, 22 Washington appellate death penalty attorneys who were contacted for possible appointment refused to take his case. Many cited the low pay and time and emotional involvement required by death penalty cases. In May 1998, after a personal restraint petition was filed by a second capital defendant, Cal Brown, 22 death penalty attorneys turned down appointment even after being offered an increased hourly rate of $65. In July 1998, a third capital defendant, Henry Marshall, filed an appellate action to appeal from his conviction and death sentence; an attorney has not yet been appointed.

At the time this report is being prepared, the state of Washington is not providing representation in these three new death penalty cases, even though the defendants are constitutionally and statutorily entitled to counsel. Failure to devise a functional fee system could have serious implications. In the past, a state's failure to provide capital defendants their constitutional rights has resulted in the reversal of death sentences.[18]

Presently, the Office of Public Defense is negotiating with death penalty attorneys to take the Stenson, Brown, and Marshall cases on an individualized cap basis, described in the Findings and Recommendations section.

[18] See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972)

V. Death Penalty Defense Cost Increases in the 1990s

From 1981 - 1998, the state of Washington has spent $1,853.016 million in state funds for the defense of appellate death penalty cases. The three greatest amounts spent in appellate death penalty defense costs for individual cases are $183,020 for In re Brett, a personal restraint petition, $159,214 for In re Benn, a personal restraint petition, and $166,563 for In re Gentry, also a personal restraint petition.[19] All these cases cost 55% more than any previous appellate death penalty case. Earlier death penalty appellate expenditures averaged far less, for example, the State v. Mak 1986 appeal and Mak's 1988 personal restraint petition each cost about $41,500, and the four appellate cases of Charles Campbell (who was executed in 1994), together cost a total of $40,017. Attorney fee rates for these cases at $50 per hour were only a fraction of rates paid by other Washington agencies to private attorneys who handle state government civil cases.[20] Nevertheless, the issue of state funds paid for the defense of death penalty cases remains a subject of interest and, sometimes, misconception by the media and the public.[21]

The Benn, Gentry, and Brett cases are unusual in that they involve very complicated issues, with unexpected problems arising at every stage of the proceedings. In each case a reference hearing has been or will be held in the trial court. For each of these reference hearings, the Supreme Court limited the issues permitted to be litigated, thus limiting the amount of time and, therefore, money, spent by each side in the case. Reference hearings, like all court hearings, require large amounts of attorney preparation time before the hearing

[19] These are total costs, including court reporter and clerk costs, expert witnesses and out-of-pocket costs to the attorneys, as well as attorney fees.

[20] For example, the Washington Attorney General pays civil attorneys in Washington to handle state cases at $125 to $200 per hour.

[21] At or about the time of Campbell's execution a reporter from a Seattle newspaper called C.J. Merritt, the Clerk of the Washington State Supreme Court to ask the amount that had been spent for Campbell's appeals. When Mr. Merritt gave him the information, the reporter answered, "No, no, tell me how much you've *really* spent." Mr. Merritt explained that $40,017 was the total cost but reminded the reporter than Mr. Merritt didn't know the costs of the trial. Later, after investigating the trial costs, the reporter called Mr. Merritt to complain that the amounts spent in the Campbell cases were too low to be newsworthy. Interview with C.J. Merritt on June 17, 1998.

and many hours of court time.[22] Reference hearings are required for the consideration of new evidence by the Supreme Court. The Washington State Supreme Court has ordered reference hearings infrequently in comparison with other states, and those which have been ordered have been relatively short in duration (see Section VI of this report).

Nevertheless, appellate death penalty costs have escalated above the inflation rate over the years. There is one major factor which has caused the increase during the 1990s as well as other, lesser factors which have had an impact.

New requirements for exhaustion of state claims. In 1991 the United States Supreme Court announced, in McCleskey v. Zant, 499 U.S. 467 (1991), clear standards on how successive, or multiple, requests for writs of habeas corpus should be handled in federal courts. In McCleskey, and habeas corpus cases decided before and after 1991,[23] the Supreme Court held that a state court petitioner may not maintain a petition in the federal court if that petition includes claims that the petitioner did not raise before in the state court. A federal court, said McCleskey, may review issues not raised in previous state court actions only if the petitioner (state court defendant) can show cause and actual prejudice for not raising the issue before.[24]

The effect of McCleskey and other habeas cases was to require that a petitioner raise all factual and legal claims in the state court at the earliest

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[22] "Capital postconviction work requires enormous amounts of time, energy and knowledge to do an adequate job." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, at 143. See also, American Bar Association, Standing Committee on Legal Aid and Indigent Defense Bar Information Program, Time and Expense Analysis in Post Conviction Death Penalty Cases (February, 1987), prepared by The Spangenberg Group.

[23] See, e.g., Murray v. Carrier, 477 U.S. 478 (1986), Teague v. Lane, 489 U.S. 288 (1989), Delo v. Stokes, 495 U.S. 320 (1990), Keeney v. Tamayo-Reyes, 504 U.S. 1(1992).

[24] *Cause* means that the petitioner must show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court.' Inexcusable neglect is not a factor which rises to the level of "cause." Id., 479 U.S. at 489, 493. Further, even if the petitioner can show that some objective factor outside of the defense prevented him/her from raising the claim, the federal court will hear the claim only if there has been *actual prejudice*. That is, that the petitioner was actually injured. Id. at 494.

possible opportunity. This requirement meant that the state courts would be the arena for intense death penalty litigation. States were required to concentrate their resources at the state court level because death penalty defense attorneys had an obligation under the federal law to conduct a thorough investigation of all facts and legal claims at the state level and to raise all possible claims in the state court. As a result, during the 1990s Washington began paying more costs at trials, appeals, and in the state personal restraint petition cases.

In 1996 the Congress passed the Antiterrorism and Effective Death Penalty Act) (AEDPA). The Act includes a number of provisions "aimed at limiting and restructuring the habeas corpus appeals process."[25] The Act particularly addresses the review given to criminal law cases in state court and, in line with McCleskey and cases following it, tightens the extent to which state court claims may be heard by the federal court.[26] AEDPA places the burden to raise all claims on state court litigants, and directs state courts to hold hearings on those claims.[27]

There are two practical consequences to AEDPA in Washington. The first is that state court costs for attorneys and their investigators and expert witnesses are higher now, and will continue to go up, because state court death penalty litigation has become more intense, since all possible claims must be raised at

[25] "Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. Section 2254," 110 Harvard Law Review 1868, at 1868.

[26] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. 2254(d).

[27] A state court prisoner may get a federal hearing on new claims not raised in the state court only if the prisoner shows that the claim rests on a new rule of law made retroactively applicable to cases on collateral review or on facts which could not have been discovered by due diligence and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 29 U.S.C. 2254(d). See also, Larry W. Yackle, "A Primer on the New Habeas Corpus Statute," 44 Buffalo Law Review 381 (1990), particularly at 389-90 and the discussion at 398, et. seq.

the state court level, unlike the past, when capital defendants could rely on the federal courts to accept review of issues not raised below.[28]

The second consequence of AEDPA is that the ultimate cost for individual death penalty cases is less because the cases will be resolved in fewer proceedings. While the state will pay more for cases in the short term, it will spend less for them in the long term. The Washington death penalty cases reversed recently in federal court, such as the personal restraint petitions of K. Mak, B. Lord, P. Jefferies, and D. Rice, are cases which were tried prior to the decision in McCleskey and before the enactment of the Antiterrorism and Effective Death Penalty Act.

AEDPA also includes special optional provisions for death penalty cases only. If a state court qualifies, that state may "opt-in" to these provisions, which expedite state death penalty cases in federal court. To opt-in a state must "1) establish by statute or rule a mechanism for appointment of counsel for postconviction proceedings for all capital prisoners, 2) ensure that appointed counsel are competent, 3) pay appointed counsel reasonable litigation expenses; and 4) offer counsel to all capital prisoners seeking postconviction relief."[29] To date, the Washington Legislature has not sought to opt-in to AEDPA's optional provisions.

Complexity of cases. The consensus of death penalty experts across the country is that death penalty law has become increasingly complex,

[28] Of the Act: "[T]here will be an increased burden on state appellate courts as federal habeas restrictions begin to take hold. When people went through state appeals, they were treated as perfunctory . . . Now the real contests will be at the state level." David Rovella, "Danger of Executing the Innocent on the Rise," National Law Journal, August 4, 1997, at 9.

[29] III The Spangenberg Report, Issue 3, at 23. See also, Hill v. Butterworth, 60 CrL 1453, Death Row Prisoners of Pennsylvania v. Ridge, 60 CrL 1432. See also, 28 U.S.C. Section 2261. These optional provisions are separate and distinct from the general provisions governing state cases in federal court, discussed above.

convoluted and involved.[30] As a consequence, specialized services of attorneys and judges who are experts in death penalty law are required. Due to the complexity of the law, it is not uncommon for mistakes to occur at trial or on appeal. Such errors lead to expanded personal restraint petition litigation and, therefore, more costs. As a result, while capital case briefs averaged 50 pages eight to ten years ago, they now number 250 pages.[31] During the last six years the number of issues that are required to be raised and considered in the state courts have increased substantially.

The numbers of current cases have gone up. One reason overall costs expended by the state on appellate death penalty cases have gone up over the last seventeen years is because the number of death penalty cases have increased. For example, from 1982 - 1986, 8 appellate death penalty cases were filed. New filings steadily increased; from 1994 to the present, the number was 13 (15 total are currently open).

In addition, at the trial level, as of September 1998 there are eight cases pending at trial in which the prosecutor plans to seek the death penalty and ten more which potentially may be death penalty cases.[32]

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[30] "The body of doctrine produced by the [Supreme] Court is enormously complex and its applicability to specific cases difficult to discern." Randall Coyne and Lyn Entzeroth, "Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions," IV Georgetown Journal on Fighting Poverty 3, at 53 (quoting Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," 109 Harvard Law Review 355, 357.. "Representation of the accused in a capital case involves a complex body of constitutional law and unusual procedures that do not apply in other criminal cases . . . 'Representation of one charged with a capital crime is one of the most serious and unpleasant responsibilities that may be visited upon a member of the bar . . . Timid counsel are of no help in this regard.' " Pruett v. State, 574 So.2d 1342, 1346 (Miss.1990) (Anderson, J., dissenting), also quoting Pruett v. Thigpen, 444 So.2d 819, 35 (Miss.1984)(Robertson, J., concurring).

[31] Interview with C.J. Merritt on June 17, 1998.

[32] Pending cases at trial: 1 in Cowlitz County, 2 in King County, 3 in Pierce County, 1 in Snohomish County and 1 in Okanogan County. Potential death penalty cases at trial: 7 in Pierce County, 1 in Franklin County, and 2 in Kittitas County. The federal government has also noted an increase in costs in death penalty cases which originate in the federal court, due to an increase in cases. In May 1998 the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, of the Judicial Conference of the United States, issued a report which said "The number of federal death penalty prosecutions has grown dramatically in the last several years, and their impact on the defender services appropriation cannot be reasonably ignored." Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, May 1998 (Executive Summary at 1).

New Supreme Court rules. In December 1997, the Supreme Court adopted a series of new rules which profoundly affect the process for appointment of counsel in trial and appellate death penalty cases. In recognition of the need to reevaluate how attorneys are appointed, the Supreme Court's Death Penalty Qualifications Panel will qualify and select counsel to be placed on a list for possible appointment for trial and appellate capital cases. Special Proceedings Rules - Criminal Rule 2 requires that two attorneys be appointed for each direct appeal. In order to be appointed to a death penalty cases, counsel

> must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. . . At least one counsel on appeal must have three years' experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience.[33]

Due to the co-counsel requirement, it is anticipated that some additional hours will be invoiced in future cases as a result of this rule. Though the new PRP attorney appointment rule, RAP 16.25, does not specifically require that two attorneys be appointed for PRPs, the Supreme Court has appointed two or more attorneys in the most recent capital PRPs, apparently due to the complexity of the issues involved.[34]

The new appellate death penalty rules are consistent with the standards recommended by the American Bar Association in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and by the Washington Defender Association's Standards for Public Defense Services as endorsed by the Washington State Bar Association's Board of Governors. (See Appendix F) The Supreme Court's adoptions of the new death penalty standards may have some impact on the costs of state death penalty appellate work.

Time Spent Inefficiently. While examining appellate death penalty defense costs, the Advisory Committee reviewed several defense briefs and reports from OPD regarding death penalty attorney invoices. There are a variety

[33] Special Proceedings Rules – Criminal Rule 2, found in Appendix E.
[34] For example, three defense attorneys were appointed in In re Brett, two defense attorneys for In re Benn , and two defense attorneys for In re Gentry.

of attorney approaches to conducting defenses and billing hours. Although in many cases where co-counsel have been appointed theyl have not both submitted bills for a high number of hours spent consulting with each other, some co-counsel both bill for daily consultations with each other, or even multiple daily consultations. Likewise, though some co-counsel make a practice of sometimes appearing separately in court for motions and writing most documents separately, other co-counsel each bill for a significant percentage of case activities.

Many defense attorneys have expressed frustration with personally conducting, and billing for, investigation time. This can occur when attorneys feel they cannot meet foundation requirements for requesting funds for an investigator until they themselves have obtained enough evidence to provide justification. This perceived necessity may lead to the billing of attorney hours which are spent investigating- at a higher hourly rate than that charged by most investigators- in appellate death penalty cases.

Another potential inefficient use of defense attorneys' time occurs when an attorney spends what seems to be a disproportionate amount of time on apparently less meritorious issues. Although federal law changes discussed previously apparently account for much of this time, some hours appear to be excessive.

Appointment of experts. Requests for authorization for money to hire expert witnesses and investigators, made by defense attorneys to the Washington State Supreme Court, used to be rare, but in the last four years the Court has authorized limited funds for such experts. In nearly every order granting these costs, the Supreme Court caps the amount that may be paid to the expert and investigator.

Washington's growing reliance on experts, which is reflected in death penalty work across the country, is consistent with the increasing sophistication

of science.[35] For example, in 1981, when Washington adopted the present death penalty statute, no one knew what impact DNA analysis would have on criminal investigation. The use of DNA, and the need for experts in DNA at trial, is only one of several innovations to impact criminal trials. Requests for experts in the future will continue under RAP 16.27, adopted in December 1997, which establishes a procedure for requesting expert services in death penalty cases.[36]

Vigorous prosecution. In an adversarial legal system, for every push there is a pull. If a prosecutor files a motion, the defense attorney is obligated to respond. The Supreme Court is inundated with both prosecutorial and defense motions in death penalty cases.[37] When a prosecutor is active, it inevitably means that the state will pay more to defense attorneys for hours spent responding to motions and other matters raised by the prosecutor.

Other factors influencing costs. Because trials have gotten longer, the cost of transcribing the trial record has gone up,[38] as have the cost of clerks' papers.[39] The size of the briefs have increased dramatically and the number of briefs required and copying costs have gone up. Finally, out-of-pocket costs have gone up. OPD now reimburses attorneys for trips to the Walla Walla prison to meet with their clients, for travel time to the Supreme Court for argument and reference hearings, and incidental expenses such as meals and lodging when incurred because of mandatory court hearings.[40] The cost increases appear to be inevitable and to have a relatively minimal impact.

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[35] In Missouri, the Public Defender budgets $30,000 for experts in each death penalty appeal. In California, counsel is granted $25,000 for investigatory purposes, including experts, in each case.

[36] RAP 16.27, found in Appendix E.

[37] For example, in In re Gentry, 56 motions have been filed by prosecution and defense attorneys.

[38] The verbatim report of proceedings (VRP) in State v.Rupe (1985) cost $7,849 and was about 3,500 pages long. It was paid at the old rate of $2.25 per page. In State v. Stenson (1998), the VRP cost was $16,803 and the transcript was 6,100 pages and was paid at the present rate of $2.75.

[39] The 1985 In re Rupe appeal had clerks' papers which cost $373. In State v. Stenson the clerks' papers cost $1,039.

[40] These out-of-pocket expenses in death penalty cases are constitutionally required, according to a body of law across the country which holds that government's failure to reimburse for expenses incurred in appointed cases amounts to an unconstitutional taking. See State ex rel. Wolff v. Ruddy, 617 S.W.2d 64 (Mo.banc 1981) and State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo.banc 1985).

Requirements of PRPs. Personal restraint petitions have always provided a vehicle for capital defendants to obtain appellate review. The PRP is designed to dispose of all issues that can conceivably by raised to challenge the conviction. The petition generally does not include issues which were raised on the direct appeal. The trend over the last 17 years in Washington is that fewer petitions are being filed. Washington court rules and statutes have restricted successive filings of PRPs by the same defendant, reflecting the federal level trend to restrict PRPs.[41]

Even though multiple PRPs are decreasing, the number of hours preparing and litigating individual petitions has gone up. The same is true for direct appeals. Cases filed after 1991 have shown a dramatic increase in the number of hours spent by death penalty attorneys in appellate review cases due at least in part to the requirement that all possible issues must be raised at the state court level.

[41] See RCW 10.73.140 and RAP 16.4(d).

VI. A Comparison of Appellate Death Penalty Defense Costs

The Legislature, in its mandate to the Office of Public Defense Advisory Committee, expressed a concern for the amount being paid to private attorneys in appellate death penalty cases and asked for an analysis of current methods for reimbursing attorneys and the development of a method of payment which will control costs. Following is an examination of death penalty counsel payments in various jurisdictions.

A. What other states pay

A good share of the 38 states which have adopted the death penalty maintain full-time public defender systems, paid by county or state governments. The rest of the states have hybrid delivery systems of different kinds of providers. No other state administers death penalty defense services in the same manner as Washington. The following is a brief description of rates of compensation in capital cases, both direct appeals and capital post-conviction actions (the equivalent of personal restraint petitions) in other states.[42]

Hourly Rates for Appellate Death Penalty Defense Attorneys.

Alabama. Attorneys are paid $40 an hour for in-court work and $20 an hour for out-of-court work with a cap of $1,000 at both the intermediate appellate court level and at the Supreme Court level.

Arizona. Formerly, capital post-conviction cases were capped at $7500; the state faced a crisis last summer when it found no attorneys willing to take cases at that amount. In response, the Arizona Legislature passed emergency legislation changing the attorney reimbursement rate in post-conviction cases to $100 per hour for up to 200 hours of work. After the $20,000 cap is spent, the attorney must petition the court for more funds.

[42] See the American Bar Association's An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases, prepared in June 1996.

California. The capital appellate rate per hour has increased to $125 an hour. Defense attorneys also have the option of being paid a flat fee from $70,000 to $200,000 (these are calculated at $125 per hour, the standard California rate).[43]

Georgia. In metropolitan areas the rate is $125 per hour in-court, and $95 per hour out-of-court. In more rural areas attorneys are paid $65-$75 per hour.

Louisiana. Death penalty attorneys are paid $65 for in-court and $57 out-of-court hours.

Missouri. Private attorneys who take conflict cases usually get paid $8,000-$12,000 for appeals and post-conviction petitions. Recently, in order to opt into to the AEDPA, the reimbursement rate was substantially increased for post-conviction petitions in Missouri. Pursuant to opting in, Missouri has instituted a plan to pay $100,000 to $150,000 to lead counsel in death penalty post-conviction petitions.[44]

Nevada. By statute, the post-conviction proceedings rate is $75 an hour with a waivable cap of $1,000.

New York. The N.Y. Court of Appeals just approved new rates for capital counsel at $175 per hour for lead counsel and $150 per hour for associate counsel.

Ohio. Court-appointed capital attorneys are paid $45 per hour with a waivable cap of $10,000.

Oregon. In conflict cases, appointed capital counsel in conflict cases are paid $55 per hour.

South Carolina. By statute, death penalty attorneys are paid $75 per hour for in-court work and $50 an hour for out-of-court work, up to a waivable maximum of $25,000.

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[43]For example, appeal of a guilty plea and capital sentencing is calculated as being worth 400 hours. But a direct appeal of a trial in which the record is over 12,000 pages is estimated to take 1,280 hours. Fees for 1,600 hours are paid in exceptional cases where there were multiple victims, multiple "incidents" and the record is over 25,000 pages long.

[44] Interview of Barbara Hoppe, Conflicts Attorney in the Missouri Public Defender System, on July 24, 1998.

Tennessee. Lead counsel are paid $100 per hour for in-court work and $75 per hour for out-of-court work, and associate counsel are paid $80 for in-court and $60 for out-of-court work in capital cases.

Texas. Under a 1995 statute, Texas reimburses counsel in the Court of Criminal Appeals at $100 per hour up to a $7,500 cap.

Federal Courts. Hours spent on habeas work are reimbursed at $100 - $125 per hour in this district. The United States District Court for the Western District of Washington paid the following amounts for attorney hours incurred during federal court review of three Washington death penalty habeas corpus actions:

$52,284 in Jeffries v. Blodgett (for one attorney)

$85,001 in Rice v. Blodgett (for three attorneys)

$329,102 in Lord v. Wood (for two attorneys)[45]

Costs for Appellate Public Defender Offices.

Many states have separate appellate death penalty defender systems. For example, Missouri recently added six appellate capital defenders and six paralegal/investigators to its defender system. Attorney salaries are set at $48,144 which will cost the state $29 per hour (not including benefits or overhead). Arizona also is considering a full-time capital appellate staff. Proposed legislation for establishing a capital appellate office suggests that attorney salaries should be around $65,000-$75,000 per attorney which will cost the state $39 to $45 per hour (not including benefits or overhead).[46]

B. Attorneys Fees in Washington State

A variety of rates are paid to attorneys who handle government cases:

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[45] Information received from Helen Halloran, habeas clerk for the U.S. District Court in the Western District of Washington, Seattle, WA on July 24, 1998. The Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, of the Judicial Conference of the United States reported in May 1998 that average costs for the defense in federal death penalty trials total $269,139. The report notes that costs for the prosecution, in the same case, are almost $100,000 higher; the average total cost per prosecution is $365,296. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, May 1998, at 5 and 7. The Report also noted that defense death penalty attorneys are paid $125 per hour, an amount that at present "appeared to be adequate." Report at 17.

[46] See Appendix H for the proposed Arizona legislation and the fiscal note to the Missouri legislation.

•The King County Prosecutor's Office pays appellate attorneys handling death penalty work an annual salary of up to $75,000.

•The Washington State Attorney General's Office contracts with private counsel in Washington to handle civil cases regarding municipal financing, the Federal Trade Commission, or other areas outside their expertise. Generally, these private attorneys are paid $125 to $200 per hour. When contracting with private counsel the Attorney General usually has an agreement that costs will be paid up to an amount certain after which the parties will reassess the lawsuit to determine how much more time is needed. The cap ensures that the private attorneys are attentive to the costs they are incurring and communicates to them that the state "doesn't have an unlimited checkbook."[47]

•The Attorney General charges the Office of Public Defense $63.50 per hour for use of one of their attorney's time when OPD consults with that office. This amount does not include overhead costs.

·Kitsap County pays private attorneys $51.38 per hour at the trial level in aggravated murder/death penalty cases. There is a cap of $30,840 which may be increased with the permission of the Kitsap County Public Defense Advisory Committee (the last two death penalty cost cases cost over $80,000 each).[48]

·Private counsel appointed to death penalty cases at the trial level in King County are paid $60 to $65 per hour.[49]

·Judges *pro tem* in the King County Family Law Court are paid $52.72 per hour.

·The average hourly fee charged by appellate experts in Seattle in private cases ranges from $125 to $250 per hour.[50]

·Court reporters who transcribe death penalty trials often are paid $17,000 to $21,000 for their transcriptions which is paid directly to them over and above their annual court salary.

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[47] Interview with David Walsh, Deputy State Attorney General, April 28, 1998.
[48] Kitsap County Auditor's Records
[49] Interview with Jim Crane, Director, King County Office of Public Defense, on July 10, 1998.
[50] Statement given in front of the OPD Advisory Committee on August 14, 1998.

VII. Determining a Reasonable Fee

Across the United States, the wide range of rates paid to appellate death penalty attorneys reflects the fact that states often set rates during crisis. The Legislature's directive that the current methods for reimbursing private death penalty attorneys be analyzed and "appropriate standards and criteria" be developed "to control costs and still provide indigent defendants with their constitutional right to representation at public expense" signals the development of a more orderly approach for Washington. Guidance in fashioning such an approach is available from a number of court decisions and appellate death penalty fee research reports.

The American Bar Association. The American Bar Association (ABA) has issued a number of studies and analyses of death penalty costs. In 1989 the ABA House of Delegates adopted the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Guidelines do not define how much appellate counsel should receive per hour, but rather establish the following standards:

A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extra-ordinary responsibilities inherent in death penalty litigation.

B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.

C. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

Though the Guidelines suggest that any system of compensation for death penalty defense attorneys should include a "reasonable rate of hourly compensation," they leave the determination of what is 'reasonable' to each jurisdiction.

The Guidelines conclude that an indigent defendant's right to "effective representation is 'inextricably interlinked' with the attorney's right to fair compensation."[51] Pervasive under-funding of counsel in death penalty cases lead to problems, as

> the temptation is too great for a lawyer to shortchange the client because he or she is not adequately being compensated for his or her time. For example, a study conducted by the National Legal Aid & Defender Association documents that in 1985, 36% of the assigned counsel in Massachusetts who responded to a survey on the issue admitted they omitted some appropriate defense activity because of inadequate compensation. Specific types of activities omitted included: interviewing the client; a full investigation of the facts; interviewing witnesses or the police; filing pretrial motions; and adequate research of the law. Omissions of such critical activities, shocking in any case, would be unconscionable in cases involving defendants who face the prospect of death. For this reason alone, counsel in capital cases ought to receive adequate reimbursement for their services.[52]

The Guidelines recommend that funding authorities take into consideration the number of hours the case requires, the skill of the attorney, and whether the attorney is lead or co-counsel.[53]

In 1975, 1988, 1990, and 1991 Washington state performed studies relating to the issue of costs in indigent criminal cases. These studies all concluded that appellate indigent services should be better regulated and

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[51] ABA Guidelines, at 80, quoting Makemson v. Martin County, 491 So.2d 1109, 1112 (Fla.1986).
[52] ABA Guidelines at 79-80.
[53] "[E]xtensive preparation and long hours characterize capital representation. Office overhead, the need for reimbursement for expenses incurred, and for compensation for time already worked do not stop during a capital case." ABA Guidelines at 81.

funded.[54]

Reasonable attorneys fees in criminal defense cases were examined in two 1970s Division III Court of Appeals cases, State v. Lehirondell and State v. McKenney.[55] In State v. Lehirondell,[56] two court appointed lawyers appealed their attorneys fee amount of $17 per hour after representing an indigent defendant in a criminal trial. The appellate court reversed, finding that the rates paid would "not only deny [the attorneys] any profit, but in all probability, will not cover their office overhead." Court appointed counsel should neither be unjustly enriched nor unduly impoverished, but must be awarded an amount which will allow the financial survival of his practice."[57]

In State v. McKenney[58] the appellate court reversed an inadequate attorney's fee award made in a criminal case.

> Skyrocketing overhead costs have greatly changed the lawyer's financial picture, amounting to as much as one-half his gross income. Complicated office equipment, library expenses, staff, rent, the telephone and other expenses take their toll. In addition, time spent representing an indigent defendant is time the attorney cannot spend on more profitable matters. Thus, inadequate compensation for representing an indigent is doubly harmful.[59]

Evidence presented in the McKenney case established that overhead costs of a law firm in Grant County in 1978 were around $21.26 per hour, and the

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[54] See Indigent Defense in Washington State, 1990 Report of the Indigent Defense Task Force, chaired by the Hon. Philip J. Thompson and issued in June 1990 (pgs. 8-10 and Appendix B). These excerpts are located in Appendix I of this report. See also the Final Report of the Washington State Advisory Group on Indigent Defense, chaired by the Hon. Joel Pritchard, Lieutenant Governor of Washington, issued in November 1991. In that report the Advisory Group noted they were asked to find ways to "contain the cost of indigent defense," but found from the beginning that "it would be highly unlikely that any recommendation could, in fact, reduce indigent defense costs in absolute terms." Final Report at i. See also, Methods of Providing Representation for Indigent Criminal Accused (A Study by the Washington State Bar Association, 1975), which says "The study found that where compensation was not related to work done by means of different fees for cases taken to trial, etc., there was an economic disincentive against satisfactory representation of the accused." Study at 4.

[55] Copies of both cases are located in Appendix J.

[56] 15 Wash.App. 502, 550 P.2d 33 (1976)

[57] Id. at 35-36.

[58] 20 Wash.App. 797, 582 P.2d 573 (1978)

[59] Id.

average number of hours which could be billed in one day was around 5 ½.

The McKenney court indicated that a reasonable rate is one that is based on "(1) evidence concerning the amount of hourly overhead chargeable to the practice of the appointed attorney, (2) evidence regarding a reasonable amount of hourly compensation for similar legal work within the community . . . , (3) evidence as to a reasonable amount of time required to prepare and present such a case, and (4) no evidence of the government's inability to provide adequate compensation for appointed counsel."[60]

McKenney is the latest case in Washington to talk of the standard to be used to determine reasonable attorneys' fees. The four factors set out in McKenney to determine reasonable attorneys fee rates provide a framework for considering appellate death penalty rates.

1. Hourly overhead. Overhead costs are critical components of fixing reasonable rates.[61] In order to estimate reasonable rates is for appellate death penalty attorneys, the Office of Public Defense surveyed attorneys in five Washington state areas regarding their overhead expenses. The estimates ranged from $2500 per month to $3900 a month.[62] All estimates were based for the costs of solo practices or small law firms. If one assumes a private attorney can bill 1660 hours per year, or 138 hours per month,[63] the solo or small firm practitioner must clear at least $18.07 per hour (based on the lowest estimate) to $28.20 per hour (for the highest estimate) in order to keep the office open.

These figures are quite conservative. Overhead costs in Seattle practices are often higher. Overhead rates at large firms are commonly at least $50 per hour.

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[60] Id.

[61] Using overhead costs in developing a formula for attorney compensation has been used by other states when faced with the issue of inadequate compensation. See Wilson v. State, 574 S.2d 1338 (Miss.1990), People v. Randolph, 219 N.E.2d 337 (Ill. 1966) and State v. Ryan, 444 N.W.2d 656 (Neb.1989).

[62] These are rock-bottom estimates, the attorneys said, which is consistent with the overhead costs quoted in the Lehirondelle and McKenney decisions (both decided over 20 years ago) where it was estimated that overhead rates were $21.26 and $30 per hour.

[63] "It has been calculated that the typical private attorney devotes approximately 1600 hours per year to his or her active law practice." The Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases, February 1987, at p. 11.

None of these overhead amounts pay the attorney's salary. If an attorney has overhead costs of $28 per hour, for example, and is reimbursed for death penalty work at $50 per hour, the attorney makes only $22 per hour, or $36,000 per year at 1660 billable hours --- 40-50% less than what the salaried prosecutor on the case may be paid. Other budgetary problems include the fact that overhead costs are incurred every hour, regardless of whether the attorney can bill for every hour. Further, because so many hours are involved in litigating an appellate death penalty case, the private attorney must turn down other private clients for lack of time.[64]

2. Charge for similar work in the community. The hourly fee for appellate attorneys in King County average from $125 to $250. Attorney affidavits filed in the Washington State Supreme Court indicate that some appellate attorneys charge $125 for most work for private clients. Evidence given in front of the OPD Advisory Committee suggested that many private criminal appellate attorneys is around $200 per hour.[65] Some experienced civil attorneys charge $250 to $300 per hour.

3. Time required to prepare and present the case. As noted in Section V of this report, the number of hours required to prepare direct appeals and personal restraint petitions in death penalty cases has gone up dramatically over the last four years. Attorneys in direct appeals are now billing from 450 to 1500 hours. In the two completed PRPs since 1994, defense attorneys billed for 1,162 and 2,564 hours.

4. Government's ability to provide adequate compensation. These high numbers of hours are, to a large degree, required by the changes in federal law described in Section V. However, due to the relatively small number of death penalty cases in Washington, total paid out each year for appellate death penalty

[64] The Rules of Professional Conduct (the ethical rules which govern the legal profession) require that a lawyer's fee be "reasonable." The factors to be considered regarding whether a fee is reasonable are, among others: time and labor required, difficulty of the question presented, the skill necessary to perform the task, the likelihood that the lawyer will have to decline other employment, the fee customarily charged in the locality for similar legal services, and the experience, reputation, and ability of the lawyer performing the service. RPC 1.5.

[65] Office of Public Defense Advisory Committee meeting, August 11, 1998.

defense has been less than $400,000. For example, in FY 98, the Office of Public Defense spent $289,100; in FY 97 the total was $362,970.[66]

The ability of the agency to pay costs is dependent on the funding the legislature appropriates to the agency. The amount at which attorneys are paid in these cases is based on policy set by the OPD Advisory Committee. As of this date, OPD has been able to pay the fees invoiced in death penalty cases.

Courts in other states. Most state courts which have considered the amount of attorneys fees in death penalty cases have held that existing state reimbursement rates should be raised, finding them too low or, even, unconstitutionally low.[67] Many such cases follow a middle road, holding that state governments are not required to pay "market value compensation" to attorneys but, on the other hand, may not pay "token compensation." The middle road involves paying "reasonable compensation," which differs from state to state.[68] Some cases define reasonable fees as the amount it costs the lawyer to stay in business combined with the ordinary and customary rate paid in private practice for similar work.[69] Courts try to balance the need for an attorney with the recognition that governments are unable to pay standard private attorneys rates for most cases.[70]

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[66] OPD paid for 4,019 attorney hours in FY98 and for 6,770 attorney hours in FY97. There is no apparent explanation for the vast difference in hours between these two years other than ordinary billing fluctuations and the fact that there were more reference hearings in FY97.
[67] Bradshaw v. Ball, 487 S.W.2d 294 (Ky.1972). See also, DeLisio v. Alaska Supreme Court, 740 P.2d 437 (Alaska 1987), State ex rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987), State v. Lynch, 796 P.2d 1150 (Okla.1990).
[68] Wilson v. State, 574 So.2d 1338 (Miss.1990), People v. Randolph, 219 N.E.2d 337 (Ill.1966).
[69] Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981), State v. Smith, 681 P.2d 1374 (Ariz.1984).
[70] State v. Ryan, 444 N.W.2d 656 (Neb.1989).

VIII. Alternatives for Controlling Costs

As directed by the 1996 Legislature, the Office of Public Defense Advisory Committee has analyzed several alternatives for controlling costs for appellate death penalty defense. Alternatives considered were:

1. Continue to pay capital attorneys $50 per hour.

2. Pay capital attorneys a higher rate per hour.

3. Pay a higher rate per hour to capital attorneys but cap payment at maximum amount.

4. Pay capital attorneys a flat fee.

5. Contract with non-profit agencies or firms to provide representation in capital cases.

6. Establish an in-house staff of attorneys to provide representation in all capital cases.

The Advisory Committee considered each alternative, noting the benefits and problems each presented within the context of the Legislature's mandate for the development of standards and criteria which control costs but ensure the constitutional guarantee of counsel.

1. Continue to pay capital attorneys the same rate of $50 per hour.

It is clear that no, or very few, experienced death penalty defense counsel will accept new cases at $50 per hour. The necessary consequence of this alternative is the appointment of attorneys who do not have substantial death penalty experience. The Supreme Court did not exercise the appointment of inexperienced attorney option during the past six months when experienced capital attorneys refused to take In re Stenson, In re Brown, and State v. Marshall. Though the Supreme Court retains authority to appoint *any* Washington attorney, the new rules specify that an appointed attorney be "learned in the law of capital punishment by virtue of training or experience." It is

possible that the appointment of inexperienced counsel claims in death penalty cases might lead to later state and federal litigation regarding whether the inexperienced attorney provided effective assistance of counsel during the state appeal or personal restraint petition.

This alternative would cost nothing in addition to the amount already appropriated in our budget for capital cases. Right now OPD allocates $405,000 annually for death penalty attorney fees and out-of-pocket costs, more than adequate to cover capital attorney fees and out-of-pocket costs in FY 97 and FY 98. Costs in death penalty cases may not be as high as expected in FY 99, or may increase dramatically as new cases begin.

2. Pay capital attorneys a higher rate per hour.

In the spring of 1998 a number of attorneys who have represented appellate death penalty defendants in the past asked the state to increase the $50 rate to $110 to $125 per hour, the rate paid by federal courts in Washington for habeas work in death penalty cases. When OPD offered to raise the hourly rate to $65 per hour, the attorneys rejected the offer.

In FY97 OPD paid for 6,770 hours of attorney time. If the hourly rate were $125, OPD would have paid $846,250 in death penalty attorney fees in FY97. In FY98, when 4,019 hours were billed, OPD would have paid $502,375. These amounts would require a legislative increase in OPD's budget. The Advisory Committee has concluded that it is impossible for OPD to meet the demands of the present death penalty attorneys for higher hourly rates without jeopardizing the rest of the appellant indigent defense program. In addition, continuing a straight hourly fee payment method would not address the Legislature's concern of controlling costs.

3. Pay a higher rate per hour to capital attorneys but cap it at a maximum amount.

The Advisory Committee also considered the possibility of paying more per hour but setting a limit on the total amount an attorney may be paid in a given case. Such an alternative would require estimating the amount of time a case demanded and then determining the hourly rate. This alternative also requires

that the limit on the amount an attorney may be paid must be flexible, due to the reality that unpredictable events may require more attorney time than initially anticipated.

The benefit to this alternative is that it controls costs by setting a limit over which attorney fees may not go. The detriment is that this alternative controls costs imperfectly. Both the state and the federal constitutions guarantee the effective assistance of counsel. If the circumstances of the case cause appointed attorneys to spend time over the limit, OPD is put in the difficult position of refusing to pay more, which may set up an ineffective assistance claim, or paying the fees and not being able to control costs.

4. Pay capital attorneys a flat fee.

Flat fee arrangements entail determining different kinds of cases that could arise (guilty plea, full guilt/innocence hearing, multiple victim case, etc.) and devising a schedule of fees which will cover all possible kinds of cases.[71] California offers its appellate death penalty defense attorneys a choice between hourly and flat fee payment agreements. The flat fee depends on the type of case being appealed. Other states offer a flat fee based on a schedule or on the amounts the state is willing to negotiate.

The benefit to the flat fee is that the agency is able to control costs and to predict with better accuracy what costs will be in a given year. The detriment is that if the case is more complicated than expected the attorney may be entitled to more money and, if not paid more, may try to withdraw from the case.

5. Contract with a contractual provider to handle capital representation.

OPD contracts with a non-profit agency and with a law partnership in Seattle to handle non-capital cases appealed to the Court of Appeals, Division One. The attorneys in both contractual groups are reimbursed on a per case basis, which pays for the contractor's staff and overhead. These contractors do not handle capital appeals though each employ attorneys who are experienced in capital work. The Advisory Committee considered the option of contracting with

[71] For example, a case in which there are fewer than 5,000 pages of VRP might be significantly easier to appeal than a case which had 15,000 pages of VRP.

either the present contractors in Division One or to seeking out new contractors who are willing to handle death penalty cases. The Advisory Committee also looked at what it would cost to have full-time contractors handling these appellate cases. It appears that contracting with non-profits or law firms to handle all appellate death penalty cases may cost more than OPD presently budgets for death penalty cases. However, this alternative may result in greater control depending on what potential contractors may require in reimbursement.

Benefits of the non-profit alternative are quality control over the work of the attorneys and predictability of costs. Since the non-profit agency contracts for a certain amount per year or per biennium, OPD can plan according to those costs. This alternative is also a cost-control measure because it prevents costs from escalating. Many states handle appellate death penalty defense through contract appellate public defender offices.

6. Establish an in-house staff of attorneys to provide capital representation.

The final alternative considered was the creation of an appellate death penalty defense attorney's office within OPD. As a prerequisite, the Legislature would have to amend OPD's enabling statute, which prohibits the direct representation of clients. Full-time state employees, including an experienced death penalty supervisor, would be located in Olympia at the OPD office. They would take all new appellate capital cases and follow those cases through the state appellate system.

The Advisory Committee determined that the cost of this alternative is a little less than the cost of a contractor's office. The benefits are the same: quality is supervised, and costs are predictable and controlled. This alternative costs somewhat more than OPD presently budgets for appellate death penalty defense and the caseload may be greater than the staff has the ability to handle (or, in the alternative, there may not be enough cases to justify the staff). There is a concern, as well, about adding employees to state government.

IX. Conclusion

The payment method for appellate death penalty cases needs to be changed. The present system is outdated. The rates attorneys are presently being paid has not changed for a decade. During that time, attorney expenses have gone up along with the cost of living. On the other hand, the amounts paid to appellate death penalty attorneys need to be controlled in order to curb inefficiencies. The following standards, criteria, findings, and recommendations were developed by the Advisory Committee to address these issues.

Standards and Criteria

Standards

1. In death penalty appellate cases a defendant's constitutional right to the effective assistance of counsel is guaranteed.

2. State and federal law require that defense representation fulfil established requirements for preserving defendants' rights in appellate death penalty cases. The state must ensure that appellate death penalty attorneys have the means to bring forth all possible legitimate factual and legal claims at the state court level.

3. Attorneys' fees in death penalty cases should reflect the reality that they are legally complex and mentally and emotionally demanding.

4. The state should not pay for death penalty attorney hours which are excessive or duplicative.

5. The appellate death penalty defense payment system should ensure accountability and encourage efficient work approaches by defense attorneys.

6. Death penalty defense attorneys should be compensated in an amount which reflects the gravity of the cases and market rates.

Criteria

1. The payment method for appellate death penalty defense attorneys should, to the extent possible, provide predictability for the defendant, defense attorney, and the state.

2. The payment method should encourage appellate death penalty attorneys to expend hours in an efficient and effective manner.

3. The payment method used for private counsel should reflect the market rate for criminal appellate cases and should provide for an hourly rate which includes reasonable overhead and fair compensation for attorneys.

Findings and Recommendations

Findings

1. The total amount spent on appellate death penalty defense by the State of Washington from 1981-1998 is $1,853,016.

2. Death penalty defense attorney hours per case during the last four years or presently open years have, on average, increased substantially.

3. The number of death penalty appellate case open at one time in Washington has increased from 8 cases in 1986 to 15 cases in 1998, increasing the total cost of appellate death penalty defense.

4. Like all appellate defense costs, death penalty defense costs fluctuate. The total amount expended by the state for appellate death penalty defense in FY 1997 was about 363,000. The total for FY 1998 was 289,000.

5. The U.S. Supreme Court's McCleskey v. Zant decision in 1991 changed death penalty law to require defense attorneys to thoroughly investigate and raise every legitimate issue in issue in state court, which is a primary reason for the recent increase in death penalty defense hours.

6. New Supreme Court rules establish that counsel appointed to death penalty appeals and personal restraint petitions must have experience or training in death penalty law and that two such attorneys be appointed for each appeal.

7. In addition to the increase of affirmative defense hours spent on issues, defense attorneys must respond to vigorous prosecution of death penalty appeals by prosecutors.

8. In some cases, the requirements and limits of advance approval for routine investigations result in attorneys conducting their own investigations.

9. Unnecessary duplication of hours by co-counsel, investigative work which is performed by attorneys rather than investigators, and over-billing of hours occurs in some appellate death penalty defense billings.

10. Defense attorney costs of transcribing the record, reproducing briefs, and out of pocket expenses have increased during the past four years.

11. Attorney overhead for private attorneys with a criminal and/or appellate caseloads average from $18 to $50 in Washington.

12. Overlapping hours due to the appointment of co-counsel should be limited to 5 to 10 percent of the appellate death penalty defense payment.

Recommendations

1. An individualized cap system is recommended for appellate death penalty defense payment in Washington. For each new death penalty case an individualized cap will be computed, based on the complexity of the issues, the length of the transcript and the record, and a reading of previous briefs and /or the record. The individualized cap will include compensation for all attorney hours expected to be spent on the case. The individualized cap amount will be agreed to by the attorney before the attorney is appointed, with the express commitment that if unpredicted circumstances arise in the case requiring more defense hours, extra compensation will be added to the contract.

    A. The individualized cap amount will be calculated by estimating the number of hours defense is expected to take times a reasonable attorneys fee rate of $85-90 per hour.

    B. The Office of Public Defense will contract with a death penalty defense expert to evaluate death penalty cases for purposes of setting future individualized caps.

    C. A contract will be entered into between the Office of Public Defense and the appointed attorneys for each case, which will specify terms and conditions of the compensation, manner of payment, and circumstances authorizing more defense payment.

    D. The contract will include an amount for routine investigation.

2. Appellate death penalty defense attorneys who are presently serving as counsel in open cases will be offered a choice between continuing the defense at $50 per hour, as agreed when they were appointed, or entering into an individualized cap fee contract with the Office of Public Defense for the remainder of the case. If an attorney opts to continue at $50 per hour, the attorney's hours will continue to be scrutinized under Office of Public Defense standards before they are approved for payment.

3. Attorneys representing defendants under individualized cap fee contracts will be required to submit invoices on a regular basis, at intervals set by the Office of Public Defense, up to the capped amount.

4. For future cases, OPD will issue a Request for Proposal seeking representation offers from qualified death penalty attorneys who wish to represent capital defendants under the individual cap payment method.

It is anticipated that the individualized cap payment method will act to control case costs because it will encourage the efficient expenditure of hours should out weigh the hourly fee increase.

The individualized cap system will raise the hourly rate for attorneys to a competitive national rate for death penalty cases. It will allow attorneys to conduct routine investigations without having to seek approval and to expend attorney hours without wondering if they will be disallowed.

Even though under the individualized cap system attorneys make more money per hour if they expend fewer hours, it should not result in lower quality defense attorney work. RAP 16.25 and Criminal Rule 2 set up detailed qualifications standards, both of which point to the appointment of experienced, able attorneys who will conscientiously represent capital defendants.

x. GLOSSARY

Ake v. Oklahoma: A 1985 decision by the United States Supreme Court which holds that the due process clause of the Constitution requires that states provide funds for the defense of state defendants to ensure they receive an adequate defense.

American Bar Association: A national, voluntary organization of attorneys which serves as the national representative of the legal profession.

AEDPA: The Anti-Terrorism and Effective Death Penalty Act, passed by the U.S. Congress in 1996, which limits and restructures the federal habeas corpus appeals process. This Act limits the amount of review a federal court will give to state court convictions.

Clerk's papers: The clerk's papers include pleadings such as motions, judge's orders, and other papers filed with the clerk of the trial court.

Furman v. Georgia: A 1972 decision by the United States Supreme Court which held that the states' death penalty statutes were unconstitutional.

Gregg v. Georgia: A 1976 United States Supreme court decision which held that the new state statutes, reinstituting capital punishment, were constitutional.

Habeas corpus: A writ which allows a confined person to appear in front of a judge, usually asking to be released from unlawful confinement. The personal restraint petition (PRP) is Washington's equivalent proceeding and is used by state court petitioners when collaterally attacking their conviction. The PRP is the means to attack the conviction in the state court and the writ of habeas corpus is used to attack the conviction in the federal court.

McCleskey v. Zant: A 1991 decision by the United States Supreme Court which limits state prisoners' access to the federal court by requiring that prisoners raise all possible grounds for relief at the first available opportunity, which usually is in state court.

Out-of-pocket expenses: Those expenses incurred by an attorney, and reimbursed by OPD, during representation. OPD has a list of guidelines governing what costs will be reimbursed, including trips to Walla Walla prison to talk to the client, Westlaw research, postage, phone calls related to representation, zeroxing, etc.

Personal restraint petition (abbreviated, PRP): The method, formerly available in Washington by a petition for a writ of habeas corpus, by which a state petitioner, usually incarcerated, may petition the appellate court for release because the incarceration is unlawful. The petition is a collateral attack on the underlying conviction and sentence.

Petitioner: the person who files the personal restraint petition, usually the one in prison and, in capital cases, is under a sentence of death.

Rules of Appellate Procedure (abbreviated, RAP): The court rules which govern how appeals are processed in the Washington state appellate courts.

Reference hearing: A hearing in the trial court, usually involving the receipt of evidence, ordered by the appellate court in either a direct appeal or, more likely, in a personal restraint petition.

Special Proceedings Rules: Appellate court rules which establish the procedure for original actions in the appellate courts, consideration of questions of law certified by a federal court, and other matters which impact the administration of the appellate courts.

Verbatim Report of Proceedings (abbreviated, VRP): A transcription of the testimony given at any trial or argument made in any proceeding in which evidence was taken or argument made.